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JOHN A. LASOTA, JR.
ATTORNEY GENERAL

December 19, 1978

George H. Parker
Acting Dairy Commissioner
1645 W. Jefferson, Suite 243
Phoenix, Arizona 85007

Re: I78- 280 (R78-235)

Dear Mr. Parker:

On July 31, 1978, former Dairy Commissioner John W. Gaunt sought our opinion on the following questions:

1. Must operators of out-of-state milk distributing plants or manufacturing milk processing plants whose products are sold to consumers in Arizona comply with the statutory requirements of A.R.S. § 3-607?

2. Must operators of out of state trade products manufacturing plants comply with the statutory requirements of A.R.S. § 3-665?

The inquiry concerning A.R.S. § 3-607 presents two legal questions. First, are the sanitary, licensing and fee requirements of A.R.S. § 3-607 intended to apply to operators of out-of-state milk distributing plants and manufacturing milk processing plants? Second, if so, is the application of this statute to nonresident operators consistent with the limitations placed on the exercise of state power by the United States Constitution? The answer to both questions is affirmative.

I

Two subsections of A.R.S. § 3-607 make specific reference to nonresident plants. Subsection D of A.R.S. § 3-607, in relevant part, provides:

> A person holding a permit issued by a governmental agency operating outside of this state whose requirements are substantially the same as the requirements of this state shall be deemed to have a permit meeting the requirements of this article, provided the facilities have first been inspected and approved also by a resident Arizona inspector, if in the opinion of the commissioner such an inspection should be made.

Subsection F of A.R.S. § 3-607 provides:

> The commissioner or dairy inspectors are authorized to inspect premises affected by this article located without the state, who shall receive subsistence and travel expenses in the amount provided for state officers, which shall be paid to the inspector by the owner of the premises so inspected.

Additionally, A.R.S. § 3-632 declares it unlawful to "bring into the state, sell, or offer for sale, milk or a milk product not meeting the requirements of this article . . . ."

Thus, it is clear from the statutory language that A.R.S. § 3-607 is intended to apply to operators of out-of-state milk processing and manufacturing plants whose products are sold within Arizona.

II

We also believe that A.R.S. § 3-607 can be applied to nonresident operators whose products are sold in Arizona without offending the commerce clause or the due process clause of the United State Constitution.

A.R.S. § 3-601, et seq. which encompasses both A.R.S. §§ 3-607 and 3-632, is a comprehensive statutory plan for regulating the dairy industry. It is a health and welfare measure enacted under the state police power to protect the citizens of Arizona. City of Flagstaff v. Associated Dairy Products Co., 75 Ariz. 254, 255 P.2d 191 (1953). In the interest of the consuming public, A.R.S. § 3-607 places three obligations on milk distributing and processing plants. Each must pass a sanitary inspection, pay a fifty dollar fee and obtain a license.

A.R.S. § 3-607.B and C provide for the annual sanitary inspection of plants by the commissioner.[1] Clearly, all plants located in Arizona must be inspected under these provisions. Moreover, subsection D of A.R.S. § 3-607, supra, essentially provides that plants located in states with substantially similar requirements are exempt from Arizona inspection unless the commissioner believes inspection is necessary. Of course, plants operating in another state whose sanitary standards substantially differ from those of Arizona must also submit to an inspection by the commissioner.

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[1] The sanitary standards used by the commissioner are contained in the 1965 recommendations of the United States Public Health Service grade "A" pasteurized milk ordinance, 1967 edition, adopted in Arizona by A.R.S. § 3-605.D.

An obligation tied to plant inspection which is placed only on out-of-state plants is the payment of expenses. The two relevant provisions are A.R.S. § 3-607.D and F, which provide:

> D. Any expense incurred for such inspection shall be at the expense of the licensee.
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> * * *
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> F. The commissioner or dairy inspectors are authorized to inspect premises affected by this article located without the state, who shall receive subsistence and travel expenses in the amount provided for state officers, which shall be paid to the inspector by the owner of the premises so inspected.

Finally, both resident and nonresident operators must pay a fifty dollar charge pursuant to A.R.S. § 3-607.E. before a license can be issued by the commissioner.

A

It is well established that a State, even in the exercise of its well recognized police power, cannot discriminate against interstate commerce. The Great Atlantic and Pacific Tea Co., Inc. v. Cottrell, 424 U.S. 366 (1976), Dean Milk Company v. City of Madison, Wisconsin, 340 U.S. 349 (1951). The first test of constitutionality under any commerce clause analysis, therefore, is whether the statute discriminates against interstate commerce.

A.R.S. § 3-607 places identical requirements on operators of both resident and nonresident plants. Any minor differences, such as reliance on inspection reports of other authorities, encourage rather than hinder interstate commerce.

It may be argued that A.R.S. § 3-607 discriminates in that out-of-state plants must pay inspection expenses pursuant to subsection D, whereas no inspection charge is placed on resident plants. But this type of charge was specifically suggested by the Supreme Court in Dean Milk Company, supra, as a nondiscriminatory alternate to the State performing its own inspection.[2]

A regulatory measure such as A.R.S. § 3-607 which does not discriminate against interstate commerce may nevertheless be unconstitutional if the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits. Pike v. Bruce Church, 397 U.S. 137 (1970). This balancing test has been used to strike interstate milk regulations as unduly burdensome when they have been supported by local economic interests rather than genuine health or welfare considerations. H.P. Hood & Sons, Inc. v. C. Chester DuMond, 336 U.S. 525 (1948); Dixie Dairy Co. v. City of Chicago, 538 F.2d 1303 (7th Cir. 1976). See also Cottrell, supra, 424 U.S. 366; Dean Milk Company, supra, 340 U.S. 349. Where a milk regulation is a true health or welfare measure, however, a broader standard of constitutionality under the commerce clause has been employed.[3]

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[2] The Court stated "if the City of Madison prefers to rely upon its own officials for inspection of distant milk sources, such inspection is readily open to it without hardship for it could charge the actual and reasonable cost of such inspection to the importing producers and processors." Dean Milk Company v. City of Madison, Wisconsin, supra, 340 U.S. at 354-55.

[3] The United States Supreme Court "has consistently rebuffed attempts of states to advance their own commercial interests by curtailing the involvement of articles in commerce, either into or out of the state, while generally supporting their right to impose even burdensome regulations in the interest of local health and safety." Hood, supra, 336 U.S. at 535.

The state's interest in its milk supply is intimately related to the health and welfare of its citizens. The need for state regulation over production, processing, manufacturing and distribution of milk and milk products has been repeatedly recognized by the courts. It has been stated by the United States Public Health Service:

> First, of all foods, none surpasses milk as a single source of those dietary elements needed for the maintenance of proper health - especially in children and older citizens . . . . Second, milk has a potential to serve as a carrier of disease and has, in the past, been associated with disease outbreaks of major proportions.

U.S. Department of Health, Education and Welfare, Grade "A" Pasteurized Milk ordinance, 1965 Recommendations of the United States Public Health Service, p. iii (1967).

The inspection, licensing and fee provisions of A.R.S. § 3-607 are directed toward insuring that milk and milk products sold or distributed for human consumption are processed and handled under acceptable sanitary standards. By maintaining inspection reports on file, the Commissioner is able to determine immediately the source of products found during testing to be adulterated.

The method of milk regulation which our legislature has prescribed was mentioned as an acceptable form of regulation on at least two occasions by the United States Supreme Court. In Dean Milk Company, supra, 340 U.S. 349, the Court found that a municipality could inspect distant milk sources and charge the inspection costs to importers. The Court's suggestion was again repeated most recently in Cottrell, supra, 424 U.S. at 377:

> . . . In the absence of adequate assurance that the standards of a sister State, either as constituted or as applied, are substantially equivalent to its own, Mississippi has the obvious alternative of applying its own standards of inspection to shipments of milk from a non-reciprocating State.

Arizona's legitimate interest in the purity of its milk supply is balanced against only slight burdens on interstate commerce. We conclude, therefore, that the application of A.R.S. § 3-607 to nonresident operators is consistent with limitations placed on state power by the commerce clause of the United States Constituion.

Additionally, the fifty dollar fee payable under A.R.S. § 3-607.E is a valid regulatory charge, since it is reasonably tied to the cost of enforcing the dairy statutes. Beloit v. Lamborn, 182 Kan. 288, 321 P.2d 177 (1958); Flynn v. Horst, 356 Pa. 20, 51 A.2d 54 (1947). The fee may offset routine expenses for plant inspection and for testing products on a periodic basis. It may further offset normal administrative costs associated with enforcing the dairy statutes, such as reviewing and filing inspection reports, and issuing licenses. Since the charge is regulatory, it becomes unnecessary to demonstrate sufficient nexus with the state as in the case of taxation of interstate commerce.[4] New Mexico ex rel. McLean & Co. v. Denver & R.G.R. Co., 203 U.S. 38, (1906); Pharmaceutical Manufacturers Association v. New Mexico Board of Pharmacy, 86 N.M. 571, 525 P.2d 931 (1974).

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[4] For cases requiring nexus with state to sustain privilege taxes as a revenue measure, see, Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, (1977); Combustion Engineering v. Arizona State Tax Commission, 91 Ariz. 253, 371 P.2d 879 (1962).

The police power of a State is often stated to be limited - by the due process clause of the United States Constitution - to activity occurring within its territorial boundaries. It might be argued that A.R.S. § 3-607, applied to out-of-state plants, necessarily regulates conduct outside the borders of Arizona in violation of the due process clause.

The mere fact that a State statute may have an estra-territorial effect, however, is not sufficient to render the statute unconstitutional. Where, as in the instant case, an exercise of police power as a health measure is concerned, the proper inquiry is whether the State:

> '. . . has taken hold of a matter within her power, or has reached beyond her borders to regulate a subject which was none of her concern because the Constitution has placed control elsewhere.' Osborn v. Ozlin, 310 U.S. 53, 60 S.Ct. 759 (1940).

Pharmaceutical Manufacturers Association, supra, 525 P.2d at 936.

A.R.S. § 3-607 does not attempt to affect or regulate the milk industry outside the boundaries of Arizona. It merely regulates to achieve a legitimate state interest in a firmly established domain of state control. Thus "repercussions beyond state lines [are] of no judicial significance. . . ." Osborn, supra, 310 U.S. at 62.

Viewed under this standard, we conclude that A.R.S. § 3-607 can be applied to nonresident operators whose products are sold or distributed within Arizona consistently with the due process clause.

III

It is also clear from the language of the statute itself that A.R.S. § 3-665 is intended to apply to out-of-state manufacturers of trade products whose products are sold in this State. Subsection E declares it unlawful to "sell, give away or deliver any trade product which has been produced in a plant that is in an unsanitary condition." Subsection F provides for revocation or suspension of a license for "manufacture of trade products under unhealthful or unsanitary conditions or in any manner which violates the provisions of this chapter."

The only remaining question regarding the constitutionality of A.R.S. § 3-665 not previously discussed relative to A.R.S. § 3-607, is whether trade products [5] are a proper subject of state regulation. It is settled that regulation of trade products is within the domain of State control. Coffee-Rich, Inc. v. Fiedler, 27 Cal. App. 3d 792, 104 Cal. Rptr. 252 (1972), aff'd. on appeal after remand, 122 Cal. Rptr. 302, appeal dismissed, 423 U.S. 1042, (1975).

We conclude, therefore, that operators of out-of-state trade products manufacturing plants must comply with the statutory requirements of A.R.S. § 3-665.

Very truly yours,

John A. LaSota, Jr.

JOHN A. LASOTA, JR.
Attorney General

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[5] A trade product is defined by A.R.S. § 3-661(3) as "a product which has the appearance, taste, smell, texture or color of, but is not, a real product; which, taken as a whole, bears resemblance to or is in imitation of a real product, or could be mistaken for a real product."